IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 460

WILLIAM J. CLEARY,
Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY,
a corporation,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

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JOHN O'C. FITZGERALD,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO 903

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Certificate of Counsel for Petitioner.

The Counsel for Petitioner here repeat the certificate filed with this petition, that:

(1) This petition for rehearing is presented in good faith and not for delay, the Petitioner not profiting from the temporary delay; and

(2) This petition for rehearing is restricted to the position that to deny the petition for certiorari in this case defeats and restricts the jurisdiction of this Court in the construction of the constitution of the United States. The issue as to such defeat and restriction of this Court was incident to substantial grounds available to petitioner in his petition for certiorari, but was not specifically presented.

Ground of Petition for Rehearing.

There is no doubt of the existence of a Federal Constitutional issue in this case, and that the type of issue involved herein has not been previously determined by this Court.

During the year 1948, as previously indicated, the Supreme Court of Illinois unanimously stated, in a case not involving the validity of a statute, that it had jurisdiction by writ of error in a case in which a question arose in the Appellate Court, the Supreme Court of Illinois saying as to a judgment of the Appellate Court: "Such a judgment is *coram non judice* and is ineffectual for any purpose but on review thereof this Court will assume and retain jurisdiction of the cause." *Dinoffria* v. *Brotherhood*, 399 Ill. 304, 307 (1948).

Under the view of the Illinois Supreme Court, the Appellate Court had no jurisdiction of the constitutional question, though in this case it was obligated to act; and the Supreme Court of Illinois has a power and duty to assume jurisdiction in such a case. Such assumption could only be by writ of error, subject to the rules of that court with respect to writ of error. The Illinois Supreme Court did not indicate its reasons in the present case, but its action is based upon the absence of both power and duty, whereas it has alleged power and duty under such circumstances.

It is certain that there is a constitutional issue, federal in character; it is certain that the Appellate Court exercised an authority with respect to such issue; it is certain that the writ of error is the only remedy recognized by the Supreme Court of Illinois as a matter of right to transfer to that Court a judgment of the Appellate Court that is *coram non judice;* and it is also certain that the petitioner in the present case complied with the rules of that Court

as to writ of error, such rules establishing different standards of time from those provided by statute with reference to petitions for leave to appeal.

If there were a right to a review of the constitutional issues by writ of error from the Supreme Court of Illinois, it is obvious that the steps toward such a writ were subject to the writ of error rules of that Court and not to statutory restrictions upon the different procedure of petition for leave to appeal, in which the Court has a discretion in determining whether it will take jurisdiction.

A restriction to the State Supreme Court's discretion upon petitions for leave to appeal, and a denial of review by this Court in a case where a federal constitutional issue is presented through an intermediate (Appellate) Court, with review denied by the highest state court, would, in the language of Mr. Justice Rutledge, be "dovetailing federal jurisdictional limitations with state procedural ones." But the effect here would be more serious than in the case of *Parker* v. *Illinois*, 333 U. S. 571.

There is no question as to the existence of a federal constitutional issue, and of the avoidance of such issue under conditions of this case.

May the Supreme Court of Illinois restrict and defeat the construction of that issue by this Court? Such an issue may obviously arise in the intermediate (Appellate) state Court, and if, as respondent contended, a review by the Supreme Court of Illinois rests upon its discretion, the negative action of that Court through refusal of hearing would defeat the possibility of review by this Court. Writ of error by the Supreme Court of Illinois would, on the other hand, present action subject to review by this Court.

It has been the intention that this Court be the body for the construction of the Constitution of the United States,

and legislation for this purpose was enacted in 1914, the same purpose being retained in section 1257 of Title 28 of the United States Code, entitled "Judicial Code and Judiciary", effective September 1, 1948. Under the construction sought to be established in the present case, so long as the constitutional issue presents itself in the State's Appellate Court, an avoidance of review by the State Supreme Court would prevent a determination of the federal issue—the State Supreme Court having a jurisdiction to end the cause.

Reliance upon a petition for leave to appeal to the State Supreme Court would abandon any right and duty of that Court and substitute therefor a remote possibility of its reviewing the case. And the denial of review would end the case, with the constitutional issue finally applied by the Appellate Court but subject to no review because *coram non judice*—such judgment being subject only to review by writ of error which is denied by the Supreme Court of Illinois.

It is highly undesirable that a practice be established by which state courts may render final judgments in the construction of federal constitutional issues.

Respectfully submitted,

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JOHN A. BROWN,
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